4-20-2012

State v. Morgan Respondent's Brief Dckt. 39057

IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 39057
	)	
vs.	)	
	)	
ANDREW DALLAS MORGAN,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE DEBORAH A. BAIL
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division

MARK W. OLSON
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEYS FOR
PLAINTIFF-RESPONDENT

ERIC D. FREDERICKSEN
Deputy State Appellate
Public Defender
3647 Lake Harbor Lane
Boise, Idaho 83703
(208) 334-2712

ATTORNEY FOR
DEFENDANT-APPELLANT

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

RULES

STATEMENT OF THE CASE

Nature of the Case

Andrew Dallas Morgan appeals from the district court's order revoking his probation and executing the sentence previously imposed upon his guilty plea to grand theft. He also challenges the Idaho Supreme Court's order denying his motion to augment the record with transcripts from previous probation violation admission and disposition hearings.

Statement of Facts and Course of Proceedings

In February 2008, Andrew Morgan entered the rooms of two patients at the Life Care Center of Boise where he was formerly employed. (6/11/08 PSI, pp.2-3.) Morgan falsely identified himself as a close family friend of both patients. (Id.) Morgan removed, from the bodies of both patients, patches containing a high-dose prescription pain-relieving narcotic, Fentanyl, which had been affixed to the patients with a strong adhesive. (Id.)

Upon noticing that the patches were missing, the Life Care Center conducted an internal investigation. (Id.) Several Life Care Center staff members reported that Morgan had visited with two patients whose pain patches were missing. (Id.) One of those patients reported that Morgan entered her room on two separate occasions and told her that he needed to remove her Fentanyl patch in order for her to avoid disease. (Id.) A patient sitter reported observing Morgan leaning over another patient who had just yelled out in pain. (Id.)

The Life Care Center put out security alerts and flyers with Morgan's photo and implemented new security procedures. (Id.) Morgan then returned to the facility and entered another patient's room. (Id.) The Life Care Center Executive Director confronted Morgan, who ran out of the building. (Id.) An Ada County detective subsequently made contact with Morgan, who admitted taking the pain patches from three Life Care Center patients to support his pain medication addiction. (Id.)

The state charged Morgan with one count of burglary and three counts of grand theft. (R., pp.38-39.) Pursuant to a plea agreement, Morgan pled guilty to one count of grand theft and the state dismissed the remaining charges. (R., pp.54-59.) In July 2008, the district court imposed a unified sentence of seven years with two years fixed, ordered Morgan to serve 120 days in the Ada County jail, and then suspended the balance of the sentence and placed Morgan on probation for seven years. (Id.)

Approximately one year later, the state filed a report of probation violation alleging that Morgan violated his probation by failing to complete required treatment through the St. Alphonsus Addiction Recovery Program and Health and Welfare, failing to inform his probation officer that he had been terminated from his employment for failing to come to work, failing to inform his probation officer that he had been prescribed narcotics for his migraine headaches, and being charged with driving without a license and insurance. (R., pp.72-80.) Morgan admitted violating his probation, and the district court revoked probation but retained jurisdiction. (R., pp.104-106.) At the conclusion of the period of

retained jurisdiction, the district court placed Morgan back on probation. (R., pp.109-113.)

Less than a year later, the state filed a second report of probation violation, alleging that Morgan violated his probation by being removed from the Easter Seals treatment program due to poor attendance and violations of his behavior contract, failing to pay supervision fees and restitution, having contact with another probationer, and using medications contrary to the manner prescribed by his physician. (R., pp.127-133.) Morgan admitted violating his probation, and the district court revoked probation and imposed his original sentence. (R., pp.158-160.)

Morgan filed a notice of appeal timely as to the second probation violation disposition order. (R., pp.155-157.) In his notice of appeal, Morgan requested the preparation of the entire reporter's standard transcript as defined in I.A.R. 25(c), which, in this case, included transcripts from Morgan's entry of plea and sentencing hearings. (Id.) He also requested transcripts of the admission and disposition hearings associated with his second probation violation. (Id.) The clerk's appellate record and requested transcripts were filed on September 30, 2011. (9/30/11 Notice of Appeal Record Filed; see generally Tr.)

On November 29, 2011, after requesting and receiving one extension of time to file his Appellant's brief (11/7/11 Order Granting Extension of Time), Morgan filed a motion to suspend the briefing schedule and to augment the appellate record with transcripts of the admission and disposition hearings associated with his first probation violation (11/29/11 Motion to Augment and to

Suspend the Briefing Schedule and Statement in Support Thereof). The state filed an objection. (12/20/11 Objection to "Motion to Augment and to Suspend the Briefing Schedule and Statement in Support Thereof.") The Idaho Supreme Court denied Morgan's motion without comment and reset the due date for the filing of Morgan's Appellant's brief. (1/12/12 Order Denying Motion to Augment and to Suspend the Briefing Schedule.)

ISSUES

Morgan states the issues on appeal as:

1. Did the Idaho Supreme Court deny Mr. Morgan due process and equal protection when it denied his motion to augment with the requested transcripts?

2. Did the district court abuse its discretion when it revoked Mr. Morgan's probation?

(Appellant's brief, p.4.)

The state rephrases the issues on appeal as:

1. Has Morgan failed to establish that the Idaho Supreme Court violated his constitutional rights by denying his motion to augment the appellate record with irrelevant transcripts?

2. Has Morgan failed to establish that the district court abused its discretion by revoking his probation after his second probation violation?

ARGUMENT

I.
Morgan Has Failed To Establish That The Idaho Supreme Court Violated His Constitutional Rights By Denying His Motion To Augment The Appellate Record With Irrelevant Transcripts

A. Introduction

Morgan contends that, by denying his motion to augment the appellate record with as-yet unprepared transcripts associated with his first probation violation, the Idaho Supreme Court has violated his constitutional rights to due process and equal protection and has effectively denied him effective assistance of counsel on appeal. (Appellant's brief, pp.5-14.) Morgan has failed to establish a violation of his constitutional rights, however, because he has failed to show that the requested transcripts are even relevant to, much less necessary for resolution of, the only issue over which this Court has jurisdiction on appeal.

B. Standard Of Review

The standard of appellate review applicable to constitutional issues is one of deference to factual findings, unless they are clearly erroneous, but free review of whether constitutional requirements have been satisfied in light of the facts found. State v. Bromgard, 139 Idaho 375, 380, 79 P.3d 734, 739 (Ct. App. 2003); State v. Smith, 135 Idaho 712, 720, 23 P.3d 786, 794 (Ct. App. 2001).

C. Morgan Has Failed To Show Any Constitutional Entitlement To The Requested Augmentations

A defendant in a criminal case has a right to "a record on appeal that is sufficient for adequate appellate review of the errors alleged regarding the

proceedings below." State v. Strand, 137 Idaho 457, 462, 50 P.3d 472, 477 (2002) (citing Draper v. Washington, 372 U.S. 487 (1963); Lane v. Brown, 372 U.S. 477 (1963); Eskridge v. Washington State Bd. Of Prison Terms and Paroles, 357 U.S. 214 (1958); Griffin v. Illinois, 351 U.S. 12 (1956)). The state, however, "will not be required to expend its funds unnecessarily" to provide transcripts or other items that "will not be germane to consideration of the appeal." Draper, 372 U.S. at 495; see also M.L.B. v. S.L.J., 519 U.S. 102, 112 n.5 (1996) ("an indigent defendant is entitled only to those parts of the trial record that are germane to consideration of the appeal" (internal citations omitted)); Lane, 372 U.S. 477; Griffin, 351 U.S. 12.

To demonstrate that the record is not sufficient, the defendant must show that any omissions from the record prejudiced his ability to pursue the appeal. State v. Polson, 92 Idaho 615, 620-21, 448 P.2d 229, 234-35 (1968) (distinguishing Martinez v. State, 92 Idaho 148, 438 P.2d 893 (1968)). See also United States v. Smith, 292 F.3d 90, 93 (1st Cir. 2002). To show prejudice Morgan "must present something more than gross speculation that the transcripts were requisite to a fair appeal." Scott v. Elo, 302 F.3d 598, 605 (6th Cir. 2002). Morgan has failed to carry this burden.

Morgan's appeal is timely only from the district court's August 3, 2011 order revoking his probation and executing his sentence after his second probation violation. (See R., pp.158-160 (order revoking probation filed August 3, 2011), pp.155-157 (notice of appeal filed August 2, 2011).) He has failed to explain, much less demonstrate, how transcripts of hearings associated with his

first probation violation are necessary to decide the only issues over which this Court has jurisdiction on this appeal. To the contrary, the record amply demonstrates that Morgan's motion to augment was properly denied because he failed to show that the transcripts he requested were necessary for adequate review of the district courts' decisions to revoke Morgan's probation and order execution of his sentences.

There is no evidence that the district court had such transcripts when it revoked Morgan's probation in August 2011, or that it relied upon anything said at the previous hearings as a basis for its decision to revoke Morgan's probation and order his sentence executed. Because the as-yet unprepared transcripts were never presented to the district court in relation to the second probation revocation proceedings, they were never part of the record before the district court in considering whether to revoke Morgan's probation and are not properly considered for the first time on appeal. See State v. Mitchell, 124 Idaho 374, 376 n.1, 859 P.2d 972, 974 n.1 (Ct. App. 1993) (in rendering a decision on the issues raised on appeal, the appellate court is "limited to review of the record made below" and "will not consider new evidence that was never before the trial court"); see also Huerta v. Huerta, 127 Idaho 77, 80, 896 P.2d 985, 988 (Ct. App. 1995) ("It is not the role of this Court to entertain new allegations of fact and consider new evidence.").

The state recognizes the Court of Appeals' statement in State v. Hanington, 148 Idaho 26, 28, 218 P.3d 5, 8 (Ct. App. 2009), relied on by Morgan (Appellant's brief, p.11), that appellate "review [of] a sentence that is ordered into

execution following a period of probation" is based "upon the facts existing when the sentence was imposed as well as events occurring between the original sentencing and the revocation of probation." There are, however, two reasons why Hanington does not support Morgan's claim of entitlement to the requested transcripts.

First, unlike Hanington, Morgan does not challenge the *sentence* that was ordered into execution following his period of probation but argues only that the district court abused its discretion in revoking his probation (see Appellant's brief, pp.14-17), a decision that is capable of appellate review without resort to information bearing on the reasonableness of the sentence that was ultimately ordered into execution.

Second, and more importantly, Hanington does not stand for the proposition that a merits-based review of a decision to revoke probation and order a sentence executed requires preparation and inclusion in the appellate record of transcripts of every hearing over which the trial court presided. To the contrary, the law is well established that, absent a showing that evidence was presented at prior hearings, and/or that the district court relied on such evidence in reaching its decision to revoke probation, an appellant is not entitled to transcription at public expense of every hearing conducted before the date probation was finally revoked. Mayer v. City of Chicago, 404 U.S. 189, 194 (1971) (state is not "required to expend its funds unnecessarily" where "part or all of the stenographic transcript ... will not be germane to consideration of the appeal" (citation and internal quotations omitted)); Draper, 372 U.S. at 496

("[T]he fact that an appellant with funds may choose to waste his money by unnecessarily including in the record all of the transcripts does not mean that the State must waste its funds by providing what is unnecessary for adequate appellate review."); see also Strand, 137 Idaho at 462-63, 50 P.3d at 477-78 (indigent appellant challenging denial of Rule 35 motion not entitled to transcription at public expense of Rule 35 hearing at which no evidence was presented).

Although there may be some circumstances that require inclusion in the appellate record of transcripts of prior hearings to fully review the revocation of probation, Morgan has failed to show, or even attempt to show, that any such circumstances apply here. Morgan has failed to point to anything in the record that would indicate that statements made at hearings associated with his first probation violation were considered or played any role in the court's decision in August 2011 to revoke Morgan's probation and order execution of the sentence after his second probation violation. As such, Morgan has failed to show that such transcripts are necessary to complete an adequate record on this appeal.

Citing Mayer v. City of Chicago, 404 U.S. 189 (1971), Morgan claims that he is only required to make a "colorable argument" that he needs "items" to complete a record before the burden transfers to the state "to prove that the requested items are not necessary for the appeal." (Appellant's brief, p.10.) He also argues, with no citation whatsoever, that "to meet the constitutional mandates of due process and equal protection," the state must provide him (and all indigent defendants) with whatever appellate record he desires unless the

state proves that "some or all of the requested materials are unnecessary or frivolous." (Appellant's brief, p.7; see also p.5 ("The only way a court can constitutionally preclude an indigent defendant access to a requested transcript is if the State can prove that the transcript is irrelevant to the appeal.").) No reading of Mayer supports these legal arguments.

Mayer was convicted on non-felony charges punishable only by a fine and he appealed, challenging the sufficiency of evidence and asserting a claim of prosecutorial misconduct. Id. at 190. The appellate court denied his request for a trial transcript at government expense on the basis of a local rule providing that verbatim transcripts of trial proceedings would be provided at government expense only for felonies. Id. at 191-93. The issue was not whether Mayer was entitled to a record of his trial, but whether he was entitled to a verbatim transcript of his trial. Id. at 193. The Court noted it addressed a similar issue in Draper, 372 U.S. 487, where the Court held that the government need not provide transcripts that were not "'germane to consideration of the appeal, and a State will not be required to expend its funds unnecessarily in such circumstances.'" Mayer, 404 U.S. at 194 (quoting Draper, 372 U.S. at 495-96). However, "the State must provide a full verbatim record where that is necessary to assure the indigent as effective an appeal as would be available to the defendant with resources to pay his own way." Id. at 195. "Moreover, where the grounds of appeal, as in this case, make out a colorable need for a complete transcript, the burden is on the State to show that only a portion of the transcript or an 'alternative' will suffice for an effective appeal on those grounds." Id.

Thus, if it is not clear on the existing record, an indigent appellant must establish that a record of certain "proceedings" is germane to the appeal. Id. at 194. Only after the germaneness of the requested record of the proceedings is established and a colorable need for a verbatim record is shown by the appellant will the burden shift to the state to demonstrate that a partial transcript or some record other than a verbatim transcript will be adequate. Id. at 194-95. See also Britt v. North Carolina, 404 U.S. 226, 227-28 (1971) (in deciding whether requested record necessary court should consider the "value of the transcript to the defendant in connection with the appeal," but standard does not require "a showing of need tailored to the facts of the particular case" and the court may take notice of the importance of a transcript).

Here the proceeding challenged on appeal is the revocation of Morgan's probation in August 2011. The record related to the district court's decision to revoke Morgan's probation and order execution of his sentence is already complete because all of the evidence considered by the district court is before the appellate court. (See generally, 6/11/08 PSI, 7/5/11 PSI, 7/18/11 APSI; R., pp.54-152; see generally Tr.)

It is Morgan's appellate burden to establish that the requested transcripts are necessary to create an adequate appellate record to review the order revoking his probation. The augmentations he sought, however, were of never before prepared transcripts of hearings held months before the state filed its second report of probation violation. Nothing in the record even suggests that the requested transcripts (or anything contained therein) were before the district

court in relation to the probation revocation proceedings. Because Morgan failed to make a showing of germaneness and colorable need for the requested transcripts, there is no burden on the state. Because all of the evidence before the district court is in the appellate record, that record is adequate for appellate review, and Morgan has failed to establish a violation of his due process rights.[1] Strand, 137 Idaho at 463, 50 P.3d at 478.

Further, Morgan's argument that the Idaho Supreme Court violated his due process rights lacks merit because Morgan *was* afforded the opportunity, prior to the settling of the appellate record, to designate not only the standard clerk's record, but also additional records necessary for inclusion in the clerk's record on appeal. I.A.R. 28(a) and (c). In fact, Morgan took advantage of this opportunity to request, and receive, transcripts of his admission and disposition hearings associated with his second probation violation. (R., pp.155-157; see generally Tr.) Therefore, Morgan was provided the process by which he could designate all documents in the record he believed were necessary for appeal. While I.A.R. 30 provides that a party may move the Idaho Supreme Court to add to the settled clerk's record, nothing therein creates a right to such augmentation. Morgan has failed to show that the ability to designate records for appellate review under I.A.R. 28 was insufficient to afford due process in his case.

---

[1] As a component of his due process claim, Morgan argues that the denial of his motion to augment the record with the requested transcripts has deprived him of effective assistance of counsel on appeal. (Appellant's brief, pp.12-14.) Because, for the reasons already explained, Morgan has failed to show that the requested transcripts are necessary, or even relevant, for appellate review of the district court's order revoking his probation, there is no possibility that the denial of the motion to augment has deprived Morgan of effective assistance of counsel on this appeal.

Morgan has also failed to establish that denial of his request to augment the record on appeal with irrelevant transcripts denied him equal protection. Morgan cites to several cases where criminal defendants were denied appellate records *because of their indigence*. (See Appellant's brief, pp.7-12 (citing, e.g., Griffin v. Illinois, 351 U.S. 12 (1956); Draper v. Washington, 372 U.S. 487 (1963); Lane v. Brown, 372 U.S. 477 (1963)).) However, there is nothing in the record that in any way indicates that the Idaho Supreme Court denied Morgan's request for transcripts solely because he is indigent. In fact, Morgan's motion would have properly been denied even if he had the funds to pay for the transcripts. The Idaho Appellate Rules require *any* party seeking augmentation to set forth a ground sufficient to justify the augmentation requested. I.A.R. 30. Morgan's motion to augment was denied because he failed to meet this minimal burden, imposed upon all parties, of showing that the transcripts were necessary or even helpful in addressing appellate issues. The Idaho Supreme Court's order properly denied the motion to augment because Morgan failed to make a showing that any appellant – indigent or otherwise – would be entitled to augment the record as requested. There is no reason to believe that the motion to augment would have been granted had Morgan been paying for the requested transcripts; the rule applies to all parties, not just the indigent.

Morgan has failed to show that the denial of his motion to augment was in any way influenced or decided by his indigence, nor has he demonstrated that the requested transcripts are necessary to complete a record adequate to review any issue over which this Court has jurisdiction on appeal. To the contrary, the

record amply demonstrates that Morgan's motion to augment was properly denied because he failed to show that the transcripts he requested were necessary for adequate review of the district court's decision to revoke Morgan's probation and order execution of his sentence. Because Morgan has failed to show his due process and equal protection rights were implicated, much less violated, by the denial of his motion to augment, he has failed to show any basis for relief.

II.
Morgan Has Failed To Establish That The District Court Abused Its Discretion By Revoking His Probation After His Second Probation Violation

A. Introduction

Morgan contends the district court abused its discretion in revoking his probation, because, he claims, probation "was achieving its intended goal [of] rehabilitating a drug addict," and because his struggles with probation were a result of Morgan "attempting to balance his chronic pain with his addiction to prescription medication." (Appellant's brief, pp.14-17.) None of Morgan's arguments establish an abuse of discretion.

B. Standard Of Review

"If a knowing and intentional probation violation has been proved, a district court's decision to revoke probation will be reviewed for an abuse of discretion." State v. Sanchez, 149 Idaho 102, 105, 233 P.3d 33, 36 (2009) (quoting State v. Leach, 135 Idaho 525, 529, 20 P.3d 709, 713 (Ct. App. 2001)).

C. The District Court Acted Within Its Discretion In Revoking Morgan's Probation

A trial court has discretion to revoke probation if any of the terms and conditions of the probation have been violated. I.C. §§ 19-2603, 20-222; State v. Beckett, 122 Idaho 324, 325, 834 P.2d 326, 327 (Ct. App. 1992); State v. Adams, 115 Idaho 1053, 1054, 772 P.2d 260, 261 (Ct. App. 1989); State v. Hass, 114 Idaho 554, 558, 758 P.2d 713, 717 (Ct. App. 1988). In determining whether to revoke probation, a court must examine whether the probation is achieving the goal of rehabilitation and is consistent with the protection of society. State v. Upton, 127 Idaho 274, 275, 899 P.2d 984, 985 (Ct. App. 1995); Beckett, 122 Idaho at 325, 834 P.2d at 327; Hass, 114 Idaho at 558, 758 P.2d at 717.

At his second probation violation admission hearing, Morgan admitted to failing to complete treatment through the Easter Seals rehabilitation program. (Tr., p.48, L.7 – p.50, L.13.) Specifically, the presentence investigator reported:

> Heidi Garrett, Easter Seals Case Manager, was contacted via telephone. She reported that Mr. Morgan was difficult to treat and was not compliant. She relayed that he missed groups "weeks at a time" and claimed his absences were due to migraine headaches. While he consistently claimed he had suffered a back injury and also suffered migraine headaches, he never produced records from a physician to verify his claim. Ms. Garrett shared that Mr. Morgan was prescribed Norco 5 and told her that he took more than his prescribed dose, because his prescribed dose was not strong enough to address his pain. Ms. Garrett said Mr. Morgan was referred to physicians who could address his pain issues; however, he did not follow up with these referrals. She explained that Mr. Morgan was provided with every service available and he only had to stay clean, look for work, and participate in treatment in order to be successful. Instead, he took his medications as he wanted to, he attended groups when he wanted to, and he did not follow through with referrals.

(7/5/11 PSI, p.6; see also 7/5/11 PSI attachments, "Case Management Client Progress Notes.") Morgan also admitted to having contact with another criminal probationer in violation of his probation. (Tr., p.50, L.14 – p.51, L.2.)

At the second probation violation disposition hearing, the district court referenced Morgan's failure to take responsibility for his crime and history of not fully participating in required treatment:

> The PSI investigator said that she felt you didn't hold yourself responsible. I think that's about right. I think you hold everybody else responsible for a lot of the bad choices you are making.
>
> You don't follow through. You don't make your appointments. You make it impossible for probation to actually work, and then you suggest that you should continue on probation even though you don't do the most basic things of probation, which is make your appointments and follow through with what you are supposed to follow through with.

(Tr., p.62, Ls.13-25.)

The district court considered Morgan's recommendation that the court retain jurisdiction for a second time so that Morgan could participate in the CAPP rider program. (Tr., p.63, Ls.6-9.) However, the court ultimately concluded that the CAPP program was not "intensive enough for a person who is avoiding facing facts as much as [Morgan is]." (Id.) Instead, because the district court felt Morgan needed a "much longer term program," the court revoked probation, ordered the original sentence executed, and recommended the IDOC Therapeutic Community. (Tr., p.63, Ls.1-5.)

That Morgan believes the district court should have reinstated his probation a second time does not establish an abuse of discretion. This is

particularly true where, as here, Morgan was given two opportunities to rehabilitate in the community, but continued to violate his probation. Because Morgan has failed to establish the district court abused its discretion in revoking his probation and ordering his sentence executed, he is not entitled to relief.

CONCLUSION

The state respectfully requests that this Court affirm the district court's order revoking Morgan's probation

DATED this 20th day of April 2012

MARK W. OLSON
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 20th day of April 2012, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

ERIC D. FREDERICKSEN
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

MARK W. OLSON
Deputy Attorney General

MWO/pm